



How to avoid the Pensions Ombudsman

PENSIONS



OMBUDSMAN

P E N S I O N S



O M B U D S M A N

**11 Belgrave Road
London
SW1V 1RB**

**Tel: 020 7834 9144
Fax: 020 7821 0065**

**www.pensions-ombudsman.org.uk
E-mail: enquiries@pensions-ombudsman.org.uk**



Introduction

The primary roles of an Ombudsman are to resolve disputes and to secure redress for those who have been caused injustice as a result of maladministration. I hope the Ombudsman's office can not only provide that reactive response but can proactively encourage pension providers, managers and administrators to improve both their general standard of administration and their way of handling complaints when they arise.

The Office of the Pensions Ombudsman has now been in existence for more than a decade and thus has built up a body of experience of the kind of problems which regularly occur. The view I have of the pensions world might be described as warped: I only see the cases which have gone wrong and I do not review the many more cases where no problems have arisen.

My (and my predecessors') determinations on individual cases are published both on my website (www.pensions-ombudsman.org.uk) and in some commercial publications and on-line systems. I do not regard these decisions as binding precedents and each needs to be seen in the context of its own detailed facts. Nevertheless, while I do not intend to be a slave to the pursuit of consistency – there is no merit in being consistently wrong – I would usually expect to take the same decision again if confronted with exactly the same facts. If I am consciously departing from a previous decision I would hope to make my reasoning clear.

When using the data bank of decisions, I would emphasise the need to search for the principles underlying my decision-making rather than concentrating on the particular facts of the case. The need to act fairly, to provide accurate information and to act in accordance with the general law and the Rules of the particular scheme are themes which run through my determinations whether they are about the award of ill-health pensions, the winding-up of schemes or the provision of retirement quotations.

To these principles I will be adding the need to take account of the Codes of Practice issued by the Pensions Regulator. While I will not automatically be critical of a decision not to follow the provisions of such a code I will be expecting Trustees to take account of such provisions and to have reasons for any decision to depart from the guidance.

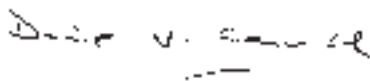
By the time a complaint reaches an Ombudsman its origins are likely to be many months, sometimes years, in the past. Parties are likely to have grown further apart during that time and positions are likely to have hardened.

My involvement does, however, open a new chapter and does therefore offer an opportunity to have a fresh look at the matter. I do urge those on the receiving end of complaints (which I recognise is not a position that is usually welcomed) to take the opportunity of having a fresh look. A good starting point is to ask, "What is it that this person is wanting?" Even better is to follow that up by checking the answer with the complainant.

Then check what, if anything, prevents that action taking place. Perhaps, surprisingly often, the answer is not very much.

Depressingly often however, the approach I have sketched out above is not the one which is followed. Instead respondents spring to defend the position which has already been staked out as the dispute grew. The gap widens, costs soar, and sometimes sight is lost of the impact on the people involved.

People are at the heart of pensions. Decisions taken, and the way they are communicated, are likely to have very significant effects on the lives of the individuals concerned. I hope that this thought can be kept in mind by all involved in the sale, administration and provision of pensions.



David Laverick

Pensions Ombudsman

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1

Communicating with members

General principles

- Comply with legal requirements.
- Avoid delays and communicate within any time limit.
- Ensure scheme members are provided with, and have access to, up to date, accurate and adequate information about the scheme and their benefits.
- Take particular care when telling members about changes to the scheme.
- Take particular care when communicating information orally.
- Before communicating any information, put yourself in the place of the recipient.
- Accept responsibility.

General legal requirements and time limits

There are statutory provisions relating to the disclosure of information to members. The scheme's trust documents may also include special provisions relating to information which must be disclosed.

All statutory requirements should be complied with, and any time limits, whether set by statute or required by the Scheme Rules, should be met. Within those time limits, schemes should avoid unnecessary delay.

Sources of information

Written information about the scheme and benefits is available from a number of sources including:

- the trust instrument and Rules and any amendments thereto;
- members' booklets;
- general announcement letters;
- benefit statements;
- letters to individual members;
- the employment contract.

Sometimes, information may be given orally, either to groups of members or in response to queries from individual members. It is important to ensure that oral information is consistent with all documented sources. If the oral information concerns changes being made to the scheme, it should be confirmed in writing to all affected members as soon as possible thereafter.

Employees may seek information about their pensions from those who deal with salary administration, a practice particularly prevalent in the public sector. Those who advise in this way need to be kept up to date. There is a risk (which needs to be managed) of such persons acting beyond their competency (and perhaps misleading the member) in an attempt to be helpful.

Ways of managing the risk and highlighting what should be the limits for such local advice might be the production of flowcharts and checklists (both of which could be available via computer). A not uncommon complaint, for example, is about inaccurate information being given about the benefits payable to a spouse after the member's death, the inaccuracy arising because of a failure to check on when the marriage took place. A structured checklist/flowchart could help avoid such complaints.

CASE STUDY

Mr F had married his second wife after retiring from service in local government. The regulations governing the Scheme provided that the spouse's pension, available to a spouse whom the member had married after retirement, was less than that available to a spouse to whom the member had been married during service. Mr F had informed the Scheme that his first wife had died.

Mr F wrote to the Scheme asking for details of the spouse's pension which would be payable in the event of his death. He was incorrectly informed that the higher widow's pension would be payable.

The Ombudsman found that, when it gave the incorrect information about the spouse's pension, the Scheme had within its possession sufficient information to determine the correct benefits. Not to do so was maladministration, and the Ombudsman found that Mr F had relied on the information when making a will, leaving fewer of his assets to his wife than he would have done had he known the true value of the spouse's pension which was available. The Ombudsman directed the Scheme to purchase an annuity for Mrs F with a capital sum equivalent to the residual estate, which he found her husband would have left to her.

The scheme booklet

The scheme booklet is particularly important, as for most members it is their first point of reference. Care should be taken to ensure that all members are provided with the scheme booklet and all revisions. Not infrequently, a member will claim that he was not given a copy of such information. Scheme administrators should consider obtaining some form of signed confirmation from members that scheme documents such as booklets have been received.

Many complaints are made to the Ombudsman on the basis that information contained in the scheme booklet is inaccurate, incomplete, misleading or out of date. Whilst the booklet cannot replicate the scheme Rule(s), it should set out the main current provisions of the scheme, should be consistent with the Rule(s) and should make clear where authoritative information can be obtained.

Often, Trustees first become aware that the booklet might be misleading or wrong when a member complains about it. It is then too late. There should be a regular audit of the booklet to assess whether it is still properly reflective of the scheme.

□ **Announcements of changes to the scheme**

It is likely that, over the years, a scheme will be amended. It is obviously important that changes to the scheme, particularly those affecting entitlement to benefits, are communicated effectively in writing to members and that those administering and managing the scheme are kept up to date with changes. As with the scheme booklet, care should be taken that the information provided is accurate, clear, concise and complete.

A clear record should be kept of all announcements that have been made. The Scheme Rules must also be amended properly if the changes are to take effect.

CASE STUDY

An announcement was made to members of Mr K's Pension Scheme in 1993, describing agreed improvements to the annual increases to pensions in payment. However, the Scheme Rules when amended provided for higher annual increases for payments from Mr K's part of the Scheme. The Trustees argued that the announcement had reflected the true intentions of the parties. They also argued that they had not appreciated that the provision in the Rule(s) did not accurately reflect the announcement and they would not have included the Rule had they known.

The Ombudsman found that it is the Trustees' responsibility to ensure that the Scheme Rules are correct and found that Mr K was therefore entitled to the annual increases provided for in the Rules.

□ **Special benefits**

Some schemes provide benefits, which are entirely discretionary in nature and amount. Often, the agreed benefits will be evidenced by an exchange of letters between the member and his employer (acting as Trustee). Great care should be taken in drafting such letters because often they will provide the only firm evidence of the member's entitlement.

The Rules of many schemes include a discretionary power to provide benefits additional to those described in the main Rules. Care should be taken to discover in whom this discretionary power to augment benefits vests. Even if the power vests in the Trustees, the prior consent of the scheme's sponsoring employer is often required. All consents should have been obtained before the member is told that such benefits are to be provided.

CASE STUDY

Mr C applied for early retirement. The consent of the Trustees and employer was required under the Scheme Rules. Mr C was sent a quotation from the insurance company providing the pension, and was asked to return an option form indicating payment preference to the company. The company secretary annotated the form "Approved by Trustees and company", signed it and forwarded it to the pension provider. A query then arose about the cost of buying an annuity to secure the pension. The Trustees and company refused to allow the early retirement.

The Ombudsman found that, regardless of actual authority, the company secretary had ostensible authority to bind the Trustees and the company, and it might be difficult to resist claims from those who had acted on the basis of the statements he had made.

When a decision is taken to provide additional benefits by augmentation for one or more members, these additional benefits should be adequately described in a letter to the member(s) concerned. Care should be taken that any limitations to, or restrictions on, the additional benefits should also be set out clearly.

CASE STUDY

The complainant was a widow. Her husband had received annual benefit statements for many years showing that she would receive a two-thirds widow's pension. One benefit statement referred to a one-half pension but, when this was queried, the company's pension department amended the statement to show the two-thirds pension. On her husband's death, a two-thirds widow's pension was paid to the complainant. One year later, the Trustees of the Scheme said they could find no evidence why she should be paid a two-thirds pension rather than one-half, the benefit which applied to other members of the Scheme.

The Ombudsman found, on the balance of probabilities, that the employer had agreed to provide a higher widow's pension for this member. He said there was no reason to believe that the Trustees, or administrators, would have purported to have agreed this augmentation without the company's approval, which was required by the Rules. Over a number of years, all parties had proceeded on the understanding that the complainant would be entitled to a two-thirds widows pension. The Ombudsman determined that it was not later open to the company to claim no knowledge of this and that they should not be allowed to reduce the complainant's benefits.

Contract of employment

Often, the contract of employment will mention retirement benefits. This may range from a simple statement along the lines that the employee will be invited to join the employer's retirement benefits scheme when eligible, to a promise of explicit benefits – essentially a retirement benefits scheme in itself.

Trustees and administrators should satisfy themselves, as far as is reasonable, that new members have not been promised retirement benefits, or special terms such as early entry, which the pension scheme will not normally provide. In case of doubt, the matter should be discussed with the employer, as quickly as possible, to establish the extent of any additional liability on the scheme and to agree that any necessary additional funding will be provided.

CASE STUDY

A complainant was a member of an insured, money-purchase Pension Scheme. The Scheme documentation stated that the Scheme sought to provide a targeted benefit related to final pensionable salary. When the Scheme had been in existence for a number of years, the regulations applying to the insurance company changed, so that it could no longer quote for targeted benefits. The insurance company did not inform the employer (which was also the Trustee) of this change, or of required premium increases, partly because in some years the employer did not inform the insurance company of salary increases.

The complainant remained entitled to the targeted pension. The employer was directed to pay the additional premiums, which would have been needed to keep the pension benefits on target. The insurance company was directed to pay the equivalent of the investment growth these premiums would have attracted.

□ Giving information orally

When information is given orally, it is essential that anyone giving such information is fully conversant with the subject and explains issues clearly and unambiguously.

The Ombudsman frequently receives complaints alleging that misleading oral information has been given, or that an assurance or promise has been given which is later not honoured. The Ombudsman will take a view based on the balance of probabilities about whose account of what happened is more accurate.

The Ombudsman may well take the view that the scheme should be bound by undertakings given by those with ostensible, even if not actual, authority to bind the scheme. For example, there may have been a conversation between a member seeking ill-health retirement and a Trustee, as a result of which the member believes that he will qualify for an ill-health pension, even though the decision does not rest with the particular Trustee and may be subject to the employer's approval.

It is therefore sensible to provide written confirmation of any oral information as quickly as possible and to invite the members to say if they believe they were told anything which is not in accordance with the written document. In the case of a private meeting between one or more members and Trustees/administrators, it is good practice for a written summary of the main points discussed to be produced immediately afterwards and for the members to sign it confirming that it is an accurate record.

CASE STUDY

The Managing Director (MD) of Mr B's company negotiated a redundancy package with him, which included a pension enhancement. There was a dispute between the MD and the other company Director and Trustee about whether the enhancement had been agreed between them. Augmentation required the consent of the company and the Trustees.

The Ombudsman found, after an oral hearing, that the evidence pointed to the Directors having discussed and agreed the enhancement. He also found that the evidence led overwhelmingly to the view that the MD had ostensible authority to negotiate the redundancy agreement with Mr B and that the agreement was therefore binding on the company.

□ Responsibility remains with the Trustees

Often, Trustees will delegate responsibility for administrative functions, for example, an insurance company will provide draft documents for approval. Trustees cannot, however, delegate their ultimate responsibility for running the scheme properly and for providing the benefits promised in the Rules.

When things go wrong, it is by no means uncommon for Trustees to try to blame the insurance company, claiming that they relied on it to get things right. The rights or wrongs of that argument should not concern the affected scheme member. Trustees should ensure that his entitlements are not affected by any failure on the part of those to whom the Trustees have chosen to delegate.

CASE STUDY

A complainant requested details from the Trustees about his maximum tax-free lump sum. The Trustees contacted the insurer, which administered the Scheme, and it provided a quotation which was passed on to the complainant. After the complainant had indicated that he wished this benefit to be paid to him, the insurer informed the Trustees that the quotation was incorrect. The complainant had entered into a legally binding agreement after he had been told he would receive his benefits, and he incurred costs of over £4,000 re-negotiating this agreement.

The Ombudsman found that the provision of incorrect information was maladministration by the Trustees. He stated that the Trustees must accept responsibility for the information provided for members of their Pension Scheme, even when that information comes from a third party acting on their behalf. If the Trustees considered the service they had received from the insurer to be less than adequate, the Ombudsman stated that that was a matter they should take up with the insurer.

The Ombudsman directed the Trustees to pay the additional costs incurred by the complainant together with compensation for distress and inconvenience.

2

Providing information to individuals – quotations and transfer requests

General principles

- Ensure that statutory requirements as to the provision of information, either at specific times or on request, are complied with within the specified time limits.
 - Keep adequate records and ensure they are properly updated.
 - Take particular care to ensure that information given, in response to specific requests, is accurate, and check such information before releasing it to the member.
 - Set up procedures to ensure information requested is provided without unnecessary delay, and that any necessary delay is explained to the member.
-

Quotations about benefits and transfer values

These should:

- comply with any statutory requirements;
- be clear as to what is being quoted and set out any assumptions on which the quotation is based;
- avoid pensions jargon wherever possible;
- state whether the quotation is an estimate or is guaranteed, and, if it is guaranteed, the period of the guarantee.

CASE STUDY

A complainant, who was retiring early because of ill-health, was given incorrect information about his benefits on three occasions.

The Ombudsman found that, on any occasion of retirement, it is unacceptable to provide incorrect information, but that the effect is compounded when incorrect information is provided at a time of greater than usual stress, as when someone is forced by ill-health to leave work. The respondents were directed to make a payment to compensate the complainant for distress and inconvenience.

□ Consequences of misquotations

Sometimes, information given to scheme members on an individual basis is inaccurate and this is the source of a number of complaints. Typically, the member will have received a misquotation of his pension benefits: this might be in connection with his pension at normal retirement date, an early retirement pension or an enhanced pension (perhaps on redundancy). A member may also have begun to receive a pension at a higher rate which has been mistakenly calculated.

Where the Ombudsman concludes that the provision of incorrect information was maladministration, he will consider whether that maladministration has caused any injustice and, in particular, financial loss.

The Ombudsman will try to put the member in the position which he would have been in had correct information been provided. If that cannot be done then compensation may be payable.

The consequences can be serious if the member has relied to his or her detriment on the incorrect information given. If, for example, the member, in reliance on an early retirement quotation, has elected to take early retirement and that decision cannot be reversed, then the loss could be the difference between his future earnings (had he stayed in employment to his normal retirement age) and his actual income (i.e. his pension plus any earnings). The member has a duty to mitigate his loss and it is sometimes the case, where alternative employment has been secured, that no actual financial loss has resulted. Even if no direct financial loss has been caused, in many cases the member is very likely to have suffered disappointment and distress, in recognition of which a compensatory payment will be directed.

All in all, great care must be taken when providing quotations for members, particularly in circumstances, such as early retirement, where it is obvious that reliance is likely to be placed on the information provided. Sometimes, particularly where a mistake has arisen out of fairly simple, perhaps mathematical, error, the error could have been avoided by checking the quotation before issue.

CASE STUDY

A complainant had been given an incorrect quotation for early retirement benefits, from a Scheme in which he was a deferred member. The lump sum benefit was overquoted by almost £9,000. The complainant showed evidence that he had relied on the quotation in planning to take early retirement from his current job.

The Ombudsman found that there was maladministration by the Trustees in providing the incorrect quotation. He found that the complainant was entitled to rely on the quotation in making his plans, even though early retirement was subject to approval by the Trustees and the company: a person who was going to receive benefits from a number of different pension schemes would be likely to need to make decisions about retirement without being able to obtain all necessary approvals in advance. The Ombudsman decided that the complainant had reasonably relied on the quotation in taking early retirement and directed the Trustees to pay him the lump sum as originally quoted.

□ Overpayments and errors

Sometimes, the consequences of a miscalculation can be far-reaching. If it is some time before the miscalculation comes to light, considerable benefits may have been overpaid. The Ombudsman would usually expect any recovery of an overpayment to take place over at least no shorter period of time than the mistake had gone undetected.

CASE STUDY

Ms F retired early due to ill-health. After her pension came into payment, the Scheme made a mistake in processing a payment increase. This resulted in an overpayment which, when it was discovered a year later, amounted to almost £3,000. The Scheme proposed recovering the overpayment by making deductions from Ms F's pension, which would recover the overpayment over 18 months.

The Ombudsman found that it was entitled to do this, but criticised the Scheme for using standard letters for debt recovery despite Ms F's correspondence attempting to understand why the overpayment had occurred and why it had to be repaid.

CASE STUDY

An enhanced pension had been paid to Miss W for a number of years. The Scheme claimed that the decision to enhance the pension had been incorrect in law and that the enhancement would be withdrawn.

The Ombudsman found that the evidential burden lay on the Scheme to show that the decision to enhance the pension had been incorrect. The Ombudsman also found that the Scheme had not provided sufficient evidence to show that the decision was incorrect and directed that the enhancement should continue to be paid.

□ Delay

A number of complaints made to the Ombudsman arise from the time taken to provide quotations of transfer values. The Ombudsman will take into account the practical realities of how long it should take to calculate the appropriate quotation, and the statutory time limits which apply, but it is good administrative practice for procedures to be in place to ensure that there is no unnecessary delay in providing such quotations. There may also be a need to take account of an individual's circumstances which may justify particularly speedy action.

CASE STUDY

Mr H had moved to New Zealand and requested a transfer value of his pension benefits. He mentioned that the exchange rate was currently favourable and requested a quick response.

The transfer value quotation was not provided for eight months because the Scheme required guidance from a government department, which was not forthcoming. The Ombudsman found that this was outside the control of the Scheme managers and was not maladministration.

However, after the transfer value quotation was provided, Mr H provided the necessary documents within ten days of receipt. There was then a further delay of three months, which the Ombudsman did not find was reasonable.

Mr H had also requested that the transfer value be paid electronically. The Scheme managers refused, on the grounds that this would incur additional costs for the Scheme. They sent a cheque, initially by surface mail, and only by airmail two weeks later after a complaint from the member.

The Ombudsman found that the Scheme knew that there had been a delay in providing the transfer value, and that Mr H was anxious to have the matter concluded because of changing exchange rates. The cost of an electronic transfer was quite modest and Mr H would no doubt have agreed to pay it had he been asked. The Ombudsman found that the Scheme managers should have taken this course to allow the monies to be transferred electronically.

3

Running the scheme

General principles

- Be conversant with the scheme and relevant statutory provisions and always act in accordance with them.
- Keep full records, including details about members who leave the scheme, so that there are no surprises if and when the scheme winds up.
- Actions should be based on actuarial, legal and investment advice where appropriate.
- Monitor the performance of investment managers.

Compliance

Trustees should familiarise themselves with scheme and statutory provisions imposing duties and obligations upon them. Trustees need to have a good understanding of the theory and practice of their scheme, so that they can properly exercise their functions. They should also appreciate when they need to employ the services of others to ensure the decisions and functions are properly executed.

Keeping records

Clearly, it is of paramount importance that Trustees should be able to identify members of the scheme and the benefits payable to them.

A number of complaints to the Ombudsman are about whether a member who leaves, without acquiring a right to deferred benefits, received a refund of contributions. These complaints could be avoided if Trustees had kept sufficient records to be able to satisfy the former member, whose memory may be inaccurate because of the passage of time since leaving the scheme, that a refund was paid.

CASE STUDY

A complainant had left employment some years previously with deferred benefits. Her former employer's Scheme had wound up and the benefits had been bought out as annuities. However, the employer, who was the sole Trustee of the Scheme, had failed to purchase an annuity for the complainant.

By the time she discovered this and contacted the Ombudsman, the employer had been wound up and, although the Ombudsman found maladministration, he was unable to provide any redress for the complainant.

CASE STUDY

The Ombudsman considered a claim that a complainant, who had left employment some years earlier, had not received the refund which, his employer said, had been sent to him. The employer had destroyed the member's superannuation file, but did have a record of a cheque being sent to the employee, in a "refund book". The complainant was able to show evidence that he had left the country by the time the refund cheque was shown as being sent, and the employer admitted that it was possible that, if a cheque was returned, it may not have been recorded in the refund book.

The Ombudsman found on the balance of probabilities, that the complainant had not received the cheque and directed the employer to pay the refund, together with interest, to the complainant.

Investment performance

One reason for a final salary scheme winding up with a deficit might be poor performance by the investment manager prior to the winding-up. Trustees should monitor the investment performance and take appropriate advice.

CASE STUDY

The Ombudsman considered a complaint about the Trustees in relation to a Scheme that was winding up in deficit. The fund was invested in managed funds, which had been performing well. The Trustees were advised that this was unlikely to continue and that they should consider changing investment managers. They held meetings with a number of managers and appointed replacements seven months after receiving the advice to do so.

The Ombudsman found that this was reasonable, as the investment of Scheme resources is a long-term activity and the Trustees acted with reasonable speed and care.

CASE STUDY

The Ombudsman considered a complaint that the Trustees of a Scheme had failed to monitor the investment performance of the Scheme's AVC provider as closely as was necessary. The interest rate offered by the provider had fallen below market rates over a period of 18 months. The Trustees had not reviewed the AVC investment performance during this period. Notifications of the changes in interest rates had been sent to the Trustees, but had not been forwarded to the members.

The Ombudsman found that it was maladministration for the Trustees not to have forwarded the notifications of interest rate changes to members with AVC funds as and when they occurred. He also found that the Trustees should have been monitoring the investment performance of the AVC regularly, and, while they would not have needed to change providers immediately the rates began to fall below market rates, they should have considered doing so after a year with no improvement.

4

Making decisions – duties and standards

General Principles

- Know what the scheme Rules say – is a decision mandatory or discretionary and who has the power to make it?
- Follow the correct principles in making a decision.
- Act impartially and fairly.
- Exercise the proper standard of care.
- Consider adopting guidelines for exercising a discretion, but be careful not to bind future decision-makers.
- Obtain such specialist advice as is necessary.

Mandatory and discretionary decisions

Scheme Rules usually require that the Trustees or employer make decisions of fact, for example, whether a member meets the test for incapacity as defined in the Rule(s), or whether a person falls within a class of potential beneficiaries. Other decisions will involve the Trustees or employer exercising discretions, for example, whether to augment benefits.

Sometimes, Trustees or employers think that they are considering the exercise of a discretion when in fact they are exercising a judgment on what the Courts and the Ombudsman would regard as a question of fact.

CASE STUDY

Mrs B transferred from one local government employment to another. The regulations provided for her new employer to exercise discretionary powers in a way that was no less beneficial to her than her previous employer's general practice.

Regulations provided for an enhancement to her pensionable service on termination of employment. The regulations apply to a pensionable employee who ceases to hold his or her employment by reason of redundancy or in the interests of efficiency. The previous employer had granted enhancements almost as a matter of course to departing employees.

The Ombudsman decided that, whether an employee ceases to hold employment by reason of redundancy, or in the interests of efficiency, is a matter of fact, although there is, of course, an exercise of judgment involved in deciding the fact as to whether an employee's departure is in the interests of efficiency. It was not a discretion and, therefore, in making the decision, the new employer was not required to follow the general practice of the previous employer.

□ Making a proper decision

Principles to follow when making a decision are that decision-makers must:

- ask themselves the correct questions;
- direct themselves correctly in law – adopting in particular a correct construction of the Rules;
- not arrive at a perverse decision and must take account of all relevant factors and ignore all irrelevant ones;
- consider what is fair and equitable in the circumstances, but the weight to be given to one factor as against another is for them to decide;
- make decisions or exercise discretions so as to use powers only for their proper purpose and not to achieve some other purpose.

CASE STUDY

Company A bought out Company B. Company B's Pension Scheme (the B Scheme) had a large actuarial surplus. The Rules of the Scheme gave the Trustees power to dispose of the surplus, but prohibited transfer of the surplus to the employer. The Rules did allow the transfer of assets and liabilities to another Scheme.

Company A entered into negotiations with the Trustees of the B Scheme, who agreed to transfer the assets and liabilities of the B Scheme into Company A's Pension Scheme. Company A would provide an agreed augmentation of the benefits payable to members of the B Scheme, and would then be paid the remainder of the surplus by the Trustees of Company A's Pension Scheme.

The Ombudsman found that the purpose of the transfer was to allow the payment of the surplus to Company A, which was not allowed under the Rule(s) of the B Scheme. The power had therefore been used for an improper purpose and Company A had acted in breach of the implied duty of good faith to its employees in negotiating the deal that it had made.

The Ombudsman directed that the payments of surplus, which had been received by Company A, should be repaid to the Trustees of Company A's Pension Scheme and held in trust under the Rule(s) of the B Scheme.

□ Impartiality and fairness

1. Employers

When making decisions or exercising a discretion, the employer must take account of the duty of good faith owed to its employees. That duty requires the employer to avoid acting in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Subject to observing that duty properly, the employer will not be criticised if it reaches a decision which serves its own best interests.

Sometimes, an employer also acts as Corporate Trustee of its own occupational pension scheme. In such cases it is particularly important for the employer to distinguish (and to be able to demonstrate that it has distinguished) its fiduciary duties (about which more details are given under "Trustees") from its role as the scheme's sponsoring employer.

This will also be a relevant consideration for an employer if the scheme Rules confer on the employer the power to reach discretionary decisions either in association with the Trustees or independently.

CASE STUDY

Mr S had learning difficulties and complained that his employer had not informed him of his right to join the Pension Scheme. The company had a system of briefings and statements in place, which the Ombudsman found would have been appropriate for most staff, but Mr S would not have appreciated the significance of the information given.

The Ombudsman considered the duty of good faith owed by the employer to its employees, and decided that it must be an aspect of good administrative practice for employers to treat their employees as individuals, in relation to Pension Scheme membership, having special requirements and characteristics. This, together with the duty of good faith, called for the company, being aware of Mr S's learning difficulties, to ensure that it took appropriate steps to enable him to be in a position to make an informed decision as to whether he should join the Scheme when he first became eligible.

2. Trustees

Trustees are required to exercise their powers in the members' best interests. That may at times conflict with the personal interests of an individual Trustee or with the interests of the employer. Trustees who hold senior positions in the business must be particularly careful to follow scrupulously the principles set out at the head of this Chapter. A Trustee who feels that his position with the employer might present him with an unavoidable conflict of interests should consider resigning his trusteeship.

Trustees must not use or deal with trust property for their own private advantage, or they will be personally liable to account for their profits.

The Ombudsman recognises that what may be in the best interests of an individual member or group of members may not be in the interests of others. As long as Trustees consider the claims of all classes of beneficiary they can act in favour of one class of beneficiary over another class. However, they should recognise that such a decision is likely to be challenged by the beneficiaries not favoured, and they should therefore be able to demonstrate that their deliberations were honest, conscientious and fair.

CASE STUDY

The Trustees of the Scheme were Directors of the participating company and members of the Scheme. The Scheme was overfunded on an ongoing basis, but was underfunded on a buy out basis. The Trustees requested transfer values for their benefits to bring funding within Inland Revenue limits.

The Trustees decided to make a transfer of their own benefits to a SSAS on a share of fund basis with the Scheme bearing the surrender penalty. The Scheme's advisors gave them a number of warnings that this would lead to the detriment of the security of other members' benefits.

The Trustees intended to make a loan to the company out of the SSAS. They had explored refunding part of the surplus to the company, but this was not allowed by Scheme Rules.

The Ombudsman found that the transfers were in breach of trust, as they were made for the collateral purpose of providing a refund/loan to the company. He found that acting in the interests of the members meant the whole of the membership. Keeping the company in business only benefited the active members, who were a minority of the membership.

The Ombudsman decided that the Trustees could not honestly have believed that taking the transfers on the basis in which they did, was in the best interests of the Scheme membership. He found that they acted in wilful default and could not rely on the exoneration clause. He directed the Trustees to repay the loss to the Scheme.

3. Professional Trustees

The Professional Trustee, or Trustee Company, effectively hold themselves out to have special skills and expertise, and often charges not inconsiderable fees for their services. The Ombudsman is therefore likely to accept few excuses from Professional Trustees who do not understand or carry out their duties properly.

CASE STUDY

Mr C, one of the Trustees of a Small Self-Administered Scheme (SSAS), which had two individual and one professional Trustee, retired with higher benefits than those provided for by the Rule(s) of the Scheme. He had previously transferred in benefits from a SSAS of which another Trustee, Mr K, was a beneficiary.

The Ombudsman found that the Trustees had not made proper decisions about the benefits payable as a result of the transfer and had not made a decision to augment Mr C's pension, as required by the Rules. They took no account of the interests of other members of the Scheme in granting the enhanced pension, and the whole transaction by which Mr C's benefits were transferred was a breach of trust by each of the Trustees.

The Ombudsman directed that the Trustees were jointly and severally liable for repaying the loss to the Scheme. He refused the request from the Professional Trustee to apportion the loss between Mr C and Mr K, who had each benefited from the transfer and the payment of enhanced benefits. He stated that such an apportionment would disregard the culpability of the Professional Trustee and would ignore the higher duty of care owed by the Professional Trustee.

□ The proper standard of care

The Ombudsman will expect the standards of care laid down by statute and the Courts to have been met. For example:

- Trustees must "exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales of impartiality between different classes of beneficiaries";
- in managing the trust affairs, for example exercising administrative powers, Trustees must take "those precautions which an ordinary man of business would take in managing similar affairs of his own";
- in exercising investment powers, Trustees should "take such care as an ordinary prudent man of business would take if he were minded to make an investment for other people for whom he felt morally obliged to provide". So, for example, "the power must be exercised so as to yield the best return for beneficiaries, judged in relation to the risks of the investment in question, and the prospects of the yield of income and capital appreciation: both have to be considered in judging the return from the investment." This duty will involve Trustees in regular monitoring of the performance of investment managers;
- Trustees, when exercising their functions, must have regard to statutory provisions for example, prohibiting discrimination on the basis of religion, belief, sexual orientation or disability.

CASE STUDY

A complaint was made about the Trustee of a Scheme in which the major asset was a property. The employer was the tenant and the Trustee entered into an agreement to lower the rent. The Trustee said that all members were shareholders of the employer and in employment with it and, if the rent were not reduced, the employer would have gone out of business. The Ombudsman criticised the lack of documentary evidence to show that a proper decision-making process was employed or proper consideration given to the interests of the members.

The complainant also complained that, after the employer went into liquidation, a lease of the building was granted to a new tenant on massively unfavourable terms. The Ombudsman found that there were serious breaches of trust, which constituted maladministration. The Trustee said that, when he was asked to execute the lease, it was on terms already negotiated by professionals. The Ombudsman's judgment was that the Trustee had been betrayed by the professionals on whom he relied, but that there was maladministration by the Trustee, as the transaction was not in the members' interests.

The Ombudsman found that the Trustee was, however, entitled to the benefit of the Scheme's exoneration clause.

□ Exoneration clauses

CASE STUDY

Even in cases where the Ombudsman has found that the Trustees have committed acts of maladministration, causing injustice to members, Trustees may be able to rely on the Scheme's exoneration clause. The Ombudsman seeks to interpret such clauses strictly.

The Trustees of the Scheme had approved a loan to the company, knowing that substantial earlier loans to the company had outstanding interest payments unpaid, and that member contributions were not being paid to the Scheme. They knew that the company was in some financial difficulties, and had failed to take any advice on the loan.

The Ombudsman found that the Trustees had acted in breach of trust in making the loan. He considered that an honest and reasonable person, before making the decision, would have had regard for the circumstances known to him, including the nature and purpose of the proposed transaction, the nature and importance of his roles and any conflict of interests, the ordinary course of business, the practicability of proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. He found that the Trustees had "turned a blind eye" and refrained from asking questions which an honest reasonable Trustee would have asked.

The Ombudsman decided that the Trustees had acted in wilful default and were not, therefore, entitled to rely on the exoneration clause. He directed them to repay the amount of the loan to the Scheme.

□ Guidelines for exercising a discretion

A decision-maker cannot usually bind its successor to exercise discretion in a particular way. At the time the discretion is exercised, the decision-maker must be able to take account of all the particular circumstances of the case. However, there are likely to be complaints if decisions appear to have been taken inconsistently and arbitrarily.

To seek to minimise such complaints, guidelines can be used, but should not be treated as binding, or be applied so rigidly as to give rise to complaints that they fetter the discretion. Guidelines should be reviewed from time to time and they should, of course, confine themselves to considerations which are relevant.

Like Trustees, the Ombudsman is not bound by his own previous decisions. Nevertheless, his own guideline is that he would normally expect to act consistently with his previous decisions unless he perceives there to be a good reason for taking a different course. Thus, a decision to depart from a previous decision would be a conscious act and the Ombudsman would usually make the reasons for that action clear. He urges schemes to follow a similar practice.

CASE STUDY

The Ombudsman considered a complaint that the Trustees of a Scheme had refused to allow a transfer of benefits into the Scheme.

The Ombudsman held that the Trustees' general policy not to accept the transfer-in of unequalised benefits did not amount to a fetter of discretion, as the Trustees reviewed their policy from time to time, and considered the complainant's case in so far that they ascertained that they would not exercise discretion because the proposed transfer fell within the terms of the policy.

CASE STUDY

Mr W applied for ill-health retirement from the Scheme. The Scheme did not allow ill-health retirement, but the Trustees had discretion to grant an enhanced early retirement pension. They had criteria for deciding whether such a pension would be granted. Mr W argued that they had incorrectly applied these criteria. The Trustees argued that the criteria were only guidelines, intended to help them in considering cases, and did not bind them to a particular decision.

The Ombudsman saw nothing wrong in Trustees using criteria when exercising a discretion. He stated that the criteria were indeed not binding on the Trustees, but a clear explanation should be given if the Trustees departed from them, and any criteria laid down should be properly construed.

The Ombudsman found, however, that the Trustees had misconstrued their own criteria and remitted the decision to them for reconsideration.

Obtain specialist advice

Trustees and employers should take advice on technical or legal matters where appropriate. They will usually be entitled to rely on that advice, provided it is properly sought and given and they have no reason to believe that it might be incorrect.

Trustees should satisfy themselves, within reason, that the chosen adviser is competent to provide the advice. If there is any possibility of a conflict of interest, Trustees should choose an adviser who is entirely independent of any Trustee and of the employer, its Directors and senior executives.

5

Making decisions – administrative principles

General principles

- Ensure that the decision is taken by a properly authorised person.
- If the decision is to be delegated, check that the proposed delegation is permitted.
- Ensure that the decision-maker has all the necessary information.
- Ensure that the recipients of the decision are regularly kept informed of the progress of matters that are of concern to them.
- Make sure that a proper decision is reached, complying with the law and applying the facts of the case.
- Take the decision at the proper time.
- Take proper steps to implement the decision.

Ensuring that the proper person makes the decision

When a decision has to be made, because either a triggering event has occurred, or because a member has made an application, the person or body that has the power to make the decision must be identified. This could be the Trustees, the employer, a third party or a combination of these.

CASE STUDY

A complainant had been granted ill-health retirement. There was then a delay in paying these benefits, as the employer's Finance Director had sought legal advice about a rumour that the complainant had become employed.

The Ombudsman decided that this delay was as a result of maladministration. The decision about the complainant's ill-health retirement had been properly made by the proper person. That was not the employer's Finance Director, who had no role to play in that decision except to arrange payment.

Delegation

If there is a power in the Trust Deed or Rules to do so, a decision, or the exercise of any discretion, may be delegated. There may though be limitations on the kind of person or body to whom authority can be given. Any decision to delegate authority to make a decision or exercise a discretion should be properly recorded. It must be clear what has been delegated and to whom. If a person is being asked to make a decision, he must ensure that he has proper authority to make it.

The delegation record needs to be kept up to date to take account of individuals moving on and of changes in the way in which positions are described.

CASE STUDY

Mr N applied for an ill-health pension from a public sector Scheme. The Regulations provided that such a pension could be paid at the discretion of a Council, which was made up of Ministers and very senior officers.

The decision about Mr N's pension was made by an exchange of minutes between the Scheme manager's staff. The Ombudsman requested information about the authority of the Council to delegate its decision-making powers. The Scheme manager responded that it was impractical for the Council to take decisions on all injury pensions, as its members were very senior and it would leave no route for appeals. It stated that the Council had delegated its powers to an Awards Panel. Although it was unable to locate the document authorising this, it did provide a letter from 1975 stating that the delegation had been authorised.

The Ombudsman stated that he had sympathy with the Council, but was not convinced that the Regulations gave it authority to delegate its decision-making powers. In any event, he had seen no evidence of any Instrument of Delegation or of the appointment of the Awards Panel. There was also no meeting of an Awards Panel when the decision was made.

The Ombudsman remitted the decision to the Council for reconsideration.

Some instruments of delegation will contain restrictions or directions on the way the delegation can be exercised. For example, a scheme may authorise a sub-committee of Trustees to make decisions on ill-health retirement applications, after taking account of specified medical advice. If a decision is taken without taking account of that advice (even if perhaps some other medical advice has been received from other than the specified source) then it will have been taken without due authority and may be set aside.

CASE STUDY

Mr C applied for an ill-health pension shortly after being dismissed from employment, which was about 18 months after he was injured at work. The Regulations of the Scheme stated that a pension became payable from the date the member became permanently disabled, and that, in making the decision about whether Mr C was permanently disabled, the Scheme managers should obtain the opinion of at least one qualified medical practitioner.

The managers obtained medical evidence about whether Mr C was permanently disabled when he was examined.

The Ombudsman found that they had made no attempt to obtain medical opinion to ascertain the date on which Mr C became permanently disabled and their decision was therefore flawed and was remitted to them.

Scheme Rules will usually permit the Trustees to delegate certain responsibilities; for example, the investment of Scheme funds. However, the Trustees remain ultimately responsible for decisions taken by the delegated bodies; in particular, they are under a duty to ensure that the Scheme is administered in accordance with the Trust Deed and Rule(s), and that the promised benefits are provided.

Trustees and employers must take particular care with the delegation of certain functions; for example, the consideration of applications for incapacity pensions to Trustee or employer sub-committees. The Ombudsman will normally expect them to be able to produce, on request, minutes to show that such delegation has been authorised and on what terms. He has stressed the need to distinguish between seeking medical advice to assist with decisions as to whether ill-health retirement should be granted, and delegating such decisions to medical advisers.

□ Information required to make the decision

The decision-maker will need to be provided with the following:

- the date and nature of the application to be considered and the time by which the decision is required to be made;
- relevant evidence and records;
- professional advice where appropriate.

The Ombudsman sees benefits in trying to ensure that, by the time the matter is placed before the decision-maker, the evidence on which the decision is to be based has been jointly agreed with the parties. Thus, there is value, when considering for example an application for an ill-health pension, in seeking agreement with the Scheme member as to the medical evidence. The decision-maker may wish to take his own advice (and possibly an independent opinion) on how to resolve any identified conflict. Again, the Ombudsman would urge the decision-maker to share that advice with the parties. If there are errors in the evidence, it is better to bring those to light before decisions are taken rather than afterwards.

It is helpful to operate a system to check that all the relevant steps have been completed before decisions are taken.

CASE STUDY

The Ombudsman considered a complaint from Mr A about an ill-health pension. The Scheme Rules were very detailed about how an appeal against a decision not to grant an ill-health pension was to be treated. Fundamental to the process, was that the medical information must be considered sufficient by both the member and the Trustees' Panel for the appeal to proceed. If the parties could not agree, a procedure was set out by which an independent report would be obtained.

The Ombudsman commended the procedure set out in the Rule(s) which, he said, was clear, unbiased and allowed both parties to know how the procedure will operate. However, he did warn that the procedure should be strictly adhered to, as if it was not it could have the opposite effect.

□ Taking the decision in time

The process of gathering information and making a decision can be lengthy. If the decision-maker keeps the member informed of the progress of the matter, and the reason for any delays, it is likely to prevent complaints about the length of time a decision takes to be made.

Decision-makers should keep an eye on the total time which is elapsing, and take particular account of any factors which make time of the essence. There may be times when it is right for decisions to be taken on the basis of such information that is available, rather than waiting an unreasonably long time for the final piece of the jigsaw to be found.

CASE STUDY

A complainant's application for an ill-health pension was delayed because the consultant instructed by the managers of the Scheme took a year to produce a report. The administrators of the Scheme argued that referral to another doctor, in the absence of any response from the consultant, would not have been appropriate.

The Ombudsman found that, if the managers and administrators were obtaining no response from the consultant, they should have sought medical advice from elsewhere. The managers were directed to backdate the payment of the pension to the date the complainant first applied for it.

□ Relevant evidence

This may include:

- the application and any correspondence;
- any supporting documentation, for example:
 - submissions from the member or employer;
 - evidence from third parties;
- the results of enquiries made by or on behalf of the Trustees.

It may well be reasonable to provide Trustees with a summary of the evidence rather than copying to them voluminous amounts of correspondence. Such a summary needs to bring out the key points made by the parties. Original documents should be made available if the decision-maker so requires.

□ Professional advice

This may include actuarial advice, for example, on whether enhancement to pensions will impose an unacceptable strain on the Scheme, or legal advice as to the interpretation of Scheme Rules.

□ Implementing decisions

The decision must be minuted with reasons given. It should then be noted on the member's file and the member, and any other interested parties, should be informed of the decision, with reasons.

The Ombudsman may view the absence of any documented reasons to support a decision, as indicating that there were in fact no supportable reasons for the the decision. Documented reasons need not themselves be lengthy, but should be sufficient to convey to the reader an understanding of the factors which have been given some weight. It may also be appropriate to record why some factors have been discounted. The reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision.

Subject to the need to preserve the privacy of individuals, where the Trustees have made a decision, they should allow the minutes of their meeting to be seen if scheme members so request. Certainly, a member who is particularly affected by a decision ought to be able to read the particular minute.

CASE STUDY

A complaint was made that Trustees had not awarded an enhanced pension to which the complainant believed the Rule(s) of the Scheme entitled him. After one reconsideration by the Chairman of the Trustees, the complainant requested a reconsideration by the full board of Trustee Directors. Before this reconsideration took place the Trustees told the complainant that the Rules on enhancement of pensions were clear and that this was not a matter for their discretion. The board then rejected his application.

The Trustees refused to provide the complainant with the minutes of their meeting, on the basis that it was not normal policy to provide minutes and the complainant had been given all the information from that part of the meeting that referred to him.

The Ombudsman found that it was maladministration not to provide the minutes, as to do so was good administrative practice, and there was no good reason in this case not to do so. Not knowing the basis on which a decision was made was an injustice in itself, and the Trustees were directed to pay compensation to the complainant.

6

Ill-health retirement

The guidance in the preceding chapters also applies to issues, which arise in making decisions as to whether ill-health pensions should be awarded but this chapter includes some more specific guidance in relation to such cases.

General principles

- Understand the test(s) as laid down in the scheme.
 - Identify what decision needs to be made.
 - Make sure the role of the medical practitioner in the process is properly understood.
 - Properly apply the facts including weighing the medical evidence, to the Rules of the scheme.
 - Consider all the parts of the test including any requirement that a member "retired" because of ill-health.
 - Ensure that the decision is not made, or actions taken, prematurely.
 - Be prepared to act urgently, if the situation so dictates, but without sacrificing the need for essential information.
-

The test for incapacity or ill-health

It will usually be necessary for the Trustees, or someone properly authorised to act on their behalf, to make a factual decision or assessment as to whether the test laid down in the scheme Rule(s) has been met.

Each particular scheme is likely to contain its own definition of what is meant by incapacity or ill-health. Many schemes will have sub-divisions distinguishing, for example, between "ill-health" and "serious ill-health". Some definitions may be based on whether the member is incapable of undertaking his own or similar employment. Others will be based on whether the member is capable of undertaking any type of work. Sometimes, the test is whether the member can undertake work with the same employer.

The Courts, and the Ombudsman, are uncomfortable with "any type of work" tests, because of the potential difficulties in applying them in practice. There may be an implied qualification to have regard to the kind of work which might reasonably be expected of the particular employee.

CASE STUDY

Mr G complained about a decision not to award him an ill-health pension. The test in the Scheme Rules was that the member must have "retired...on the grounds of ill-health".

The Ombudsman held that the test should be read as requiring the member to be permanently unfit for his current or similar employment, not that he should be unfit for any employment.

Some schemes may include provisions requiring a specified period of ill-health before the benefit is triggered.

There may be separate provisions for temporary and permanent incapacity. Some schemes have provisions allowing the payment of ill-health pensions to be reviewed, and thus take account of later changes, for better or worse, in the member's state of health.

The Rules may make specific provision as to when the member's state of health is to be assessed.

CASE STUDY

Mr R had left employment, but at that time was not considered eligible for an ill-health pension. The Scheme provided for an immediate pension to be payable to a deferred pensioner who "suffers from such ill-health as would, in the opinion of the employer, have resulted" in his qualifying for an ill-health pension on retirement i.e. he should meet a test that he was permanently incapable of performing his former job.

Mr R's health deteriorated and his condition was reviewed. The medical adviser to the Scheme recommended that he be paid an immediate pension from the date of the adviser's report to the employer.

The Ombudsman found that the immediate pension applies from the time that the deferred member "suffers from such ill-health", not from the date of the medical adviser's recommendation, and that the employer had not made sufficient effort to find out what that date was.

□ The role of the medical practitioner

Scheme Rules will often specify that a medical practitioner will need to provide an opinion about the member's health. However, this does not necessarily transfer responsibility for the decision to the practitioner. That is a responsibility which, under most scheme Rules, rests with the Trustees, who need to apply the medical advice to the criteria for deciding whether ill-health has been established and whether to make any payment.

Usually, the practitioner should be seen as a person providing the information and evidence needed by the decision-maker, rather than the person who himself makes the decision as to whether there is an entitlement to a pension.

In the Ombudsman's experience, many doctors add to their advice by expressing an opinion as to whether or not an ill-health pension should be granted. That opinion is often not based on any understanding, on the doctor's part, of what the particular definition of ill-health is under the scheme, or of whether any consents from other parties are needed as to whether an ill-health pension should be paid. A General Practitioner, for example may be entirely correct in reaching a view that it would be in the interests of the member's physical or mental health for ill-health retirement to be granted. But that is a different question from determining whether the criteria for ill-health retirement under the particular Scheme Rule(s) have been met. There may also be times when a medical practitioner legitimately feels that it would not be in the member's medical interest to retire, but again this may not be a proper factor in assessing whether a benefit can or should be provided in accordance with the scheme Rules. The decision-maker needs to be alert to such factors which may be colouring the medical reports before him.

If the scheme requires assessment against the criterion of being able to carry out the member's own job or some other specified jobs, then, for the doctor's opinion to carry weight, he or she will need to know what such work entails. What work entails in practice may sometimes differ from what it is said to entail in theory. The decision-maker may need to establish on what basis such advice is being offered.

CASE STUDY

The Ombudsman found that a review by the Trustees of a decision not to award Mr G an ill-health pension was flawed, because he was not convinced that the doctor, on whose reports the decision was based, had appropriate evidence regarding the nature of Mr G's employment before him, when he was preparing the reports. The Trustees should have provided this evidence to the doctor.

CASE STUDY

The Ombudsman considered an application where the Scheme Rules provided for an ill-health pension to be paid where the employer was satisfied that the member had retired on the grounds of "incapacity." The employer issued guidelines to its medical advisers indicating that the criteria were- reduced life expectancy of five years, reduced quality of life, or the unlikelihood of being able to do any form of work again.

The Ombudsman found that the employer's approach, and the guidelines it had issued, did not, in fact, reflect the test in the Rules as they had adopted a more rigorous approach than had appeared in the rules.

The decision-maker should also be aware of when he or she is receiving first hand clinical evidence as opposed to receiving comment and advice from one doctor about the clinical findings made by another. Both kinds of material may need to be taken into account but may attract different weight.

Medical practitioners may, understandably, be reluctant to express an opinion as to what the member's condition was at an earlier date than the practitioner's examination of the patient. Nevertheless, Trustees will often find themselves having to take decisions on such a basis and may therefore need to obtain specific advice to help them so to do.

The Ombudsman encourages pension schemes to ensure that the member concerned has the opportunity of seeing and commenting on the medical advice offered about him or her before it is considered by those who have to make their decision upon it.

CASE STUDY

The complainant's application for an ill-health pension was turned down, based on the advice of Dr S, the Trustees' chosen medical adviser. The complainant appealed against this decision, providing additional medical evidence. Dr S was asked to comment on the evidence and was critical of the opinions in support of the complainant. The complainant was not given an opportunity to comment on the advice given by Dr S.

The Ombudsman decided that this was unfair and may have deprived the Trustees of more evidence which was relevant to their decision. This amounted to maladministration on the part of the Trustees and the decision was remitted to them to reconsider after obtaining further medical advice.

Applying the facts of the case

Trustees may have personal knowledge of a particular member. This may lead to Trustees themselves, in effect, giving evidence to fellow Trustees about their assessment of the member's condition. Before a decision is taken in that way, the Trustees should ensure that the member concerned has had the opportunity to comment on the evidence so presented.

If the assessment needs to be made against the needs of a particular job, then those making that assessment must ensure they themselves understand what the needs of the job are.

CASE STUDY

Trustees had received a report from Mr G's manager that Mr G had been unable to cope with the stresses of his job, even on a part-time basis, as he recuperated from illness. The manager recommended Mr G for ill-health retirement, as he doubted he would be able to cope with normal work, as the demands of the job were increasing. The Trustees turned down Mr G's application on the basis of this report and a medical opinion which was not entirely clear.

The Ombudsman found that the Trustees should have obtained further clarification about the nature of Mr G's job from his manager, before making their decision, as he did not consider that they had sufficient evidence on which to base their decision.

□ Weighing the medical evidence

If there is a divergence of medical opinion, then thought should be given as to whether obtaining further medical evidence would be helpful. With or without that further evidence, the decision-maker is entitled to weigh the evidence and prefer one opinion over another. It is good administrative practice to make a note of why such preference has been accorded.

A decision that goes against the weight of the medical evidence may be perverse, but this is not the same as saying that a decision to pay benefits can or should only be made by the practitioner concerned.

Medical practitioners will often be called upon to advise a number of schemes, each of which will have different criteria as to what constitutes ill-health or incapacity. The medical practitioner may not be familiar with the Rules of the scheme on which he or she is being asked to advise, but may couch the advice in terms which suggest he or she has such knowledge. Those taking the decision should be sufficiently conversant with the Rules of the particular scheme, to guard against that risk.

CASE STUDY

A complainant claimed that his application was improperly considered, because the medical reports obtained by the Trustee, on which his application was considered, differed from his own doctor's report.

The Ombudsman held that the decision that the complainant did not come within the definition of incapacity, which applied to the Scheme, was not perverse on the basis of the information available. Faced with differing medical opinions, the Trustee had needed to use its judgement to come to a decision. When the Trustee considered the application, it had input from the complainant's General Practitioner and also an independent medical assessor, whose report had regard to the complainant's General Practitioner's notes, and who concluded that there was no physical cause for the complainant's incapacity.

□ Applying a requirement that the member retired because of incapacity

The Courts have held that termination of employment by dismissal may constitute a retirement. So, for example, a member dismissed by reason of incapacity may qualify for an ill-health pension where the provisions provide for retirement by reason of incapacity.

CASE STUDY

The Ombudsman considered what the words "if he retires from Pensionable Service" meant. The Ombudsman decided that Trustees were obliged to consider whether the complainant had "retired". They were required to take into account the reasons for the complainant's dismissal in the sense that, if one of the factors leading to his dismissal had been the state of his health, then the Trustees should consider whether his condition was such that he would have otherwise qualified for an ill-health pension. It was reasonable for the Trustees to consider the complainant's state of health prior to his dismissal, and any compromise agreement reached with the company in connection with his dismissal. If the Trustees were reasonably satisfied that the complainant's state of health was not the reason for his dismissal, then they would be correct in saying that he had not "retired" for the purposes of the Rule. The complainant's health deteriorating before his dismissal does not, of itself, prove that the reason for his dismissal was his poor health; and that his health continued to deteriorate after his dismissal does not necessarily mean that the available medical evidence would have supported ill-health retirement at the time.

Making decisions or taking actions at the correct time

Trustees are sometimes faced with medical advice that the case should be reviewed at some time in the future. Whether or not that is possible will depend upon the Rules of the scheme. In many cases, a decision will need to be on the application which has already been made to the Trustees and the Ombudsman is likely to be critical if there are lengthy delays in determining that application.

Be prepared to act urgently

Some schemes provide for a terminally ill member, with only a limited life expectancy, to receive a lump sum in lieu of his or her benefits. It may be necessary to act with urgency to ensure that the member completes any necessary paperwork before his or her death, to enable the election for a lump sum payment to be effective.

CASE STUDY

The Ombudsman considered a complaint from the executors of the estate of Miss A. She had left employment and requested early retirement. The Trustees of the Scheme were aware that this was because she was suffering from terminal cancer. Six weeks after she made her request for early retirement benefits she died. The executors complained that the lump sum available was less than it should have been under the Scheme Rules for exceptional circumstances of serious ill-health.

The Ombudsman found that, in Miss A's circumstances, the delay of one month by the Trustees in contacting her doctor for a medical report, was maladministration, and ordered them to pay the additional lump sum which would have been paid to Miss A if her benefits had been settled prior to her death.

7

Death benefits

General Principles

- Know what the scheme Rules say – is a lump sum death grant or dependent's pension payable, and if so, to whom and within what timescale?
- Check that the proposed beneficiary is within the class of beneficiaries to whom payment can be made.
- Ensure that the decision-maker has all the necessary and relevant information (see also Chapter 4 of this Guide).
- Ensure that any discretion is exercised properly (see also Chapter 5 of this Guide).
- Consider any nomination form and what weight is to be attached to it.
- Inform interested parties of the decision and, if appropriate, give reasons.
- Be aware of the need to act with sensitivity.

What the scheme says

The payment of any lump sum benefit will be governed by the Trust Deed or Rules (or regulations in the case of a statutory scheme). Trustees, or others making a decision as to the payment of a lump sum benefit, should ensure that they are familiar with the relevant scheme Rules, so that they are fully aware of the circumstances in which a lump sum death benefit can be paid, they know to whom payment must or can be made, and whether there is any time limit within which payment must be made.

Deciding on beneficiaries

The Trust Deed, Rules or regulations will usually set out the class of beneficiaries to whom payment may be made. Sometimes, the apportionment of the lump sum between two or more beneficiaries is permitted. Certain potential beneficiaries within the class of beneficiaries may be readily identifiable as such (for example, a spouse, the member's children etc). In some cases, the decision-maker may have to decide if a particular person meets the definition of, for example, a person who was "financially dependant" on the member, so as to come within the class of potential beneficiaries. A partner, who has his or her own income and assets, may or may not come within that definition.

The Ombudsman will expect the Trustees to have some process in place to check that they are aware, so far as is reasonable, of people who may fall within the class of potential beneficiaries. For example, he is likely to expect that the Trustees will have asked the deceased member's immediate colleagues about his personal circumstances. The Trustees should also consider asking those who are named on the nomination form whether the member had any relationships which might bring others within the definition of potential beneficiaries within the scheme Rules.

Sometimes, a complaint will be made on the basis that payment has been made to the deceased member's spouse, even though they were estranged at the date of death. However, if no divorce has been finalised, the scheme Rules or regulations may be such that the legal widow or widower is the legitimate beneficiary. In other cases, for example, where the Rules say that, after a specified time, payment must be made to the deceased member's legal personal representative, the decision-maker would need to check the will and the grant of representation before making payment.

CASE STUDY

The complainants were the children of a deceased member, who had been in the process of divorcing her second husband, although no decree absolute had been issued. A financial settlement had been reached and the member's will left her estate to her children. However, no nomination form had been completed, apparently because the member incorrectly believed that any benefits payable on her death would be minimal.

The relevant Scheme Rule provided that, in the absence of a nomination form, payment be made to any surviving widow or widower. The payment was made to the member's widower.

The Ombudsman found that, although the outcome was manifestly not what the member would have wanted, the Trustees had acted correctly. The death grant could only be paid in accordance with the Rules, that particular Rule was clear, and there was no provision for the exercise of any discretion. Since there had been no decree absolute, there was a legal widower at the time of the member's death, and the payment had to be made to him.

□ The exercise of any discretion

There is often a discretion to decide to whom, within the class of qualifying beneficiaries, payment of the lump sum should be made. The general principles which apply to the making of a decision, and the exercise of a discretion, and which are set out elsewhere in this Guide, are applicable. Although in many cases the decision and the exercise of any discretion will be clear cut, typically in favour of a surviving spouse, some cases give rise to more difficulty, often where the deceased member has remarried. In other cases, it may be necessary to weigh the interests of different parties, for example, the deceased member's parents, and a co-habitee of whom the parents, may not approve.

Sometimes, a disappointed beneficiary will complain that another beneficiary's interests have been preferred. It is important that all the relevant facts are established. This may involve an investigation (sometimes against an acrimonious background) of the deceased's domestic, personal and financial situation as well as that of any potential beneficiaries. It may also be necessary to check what other financial provision, for example, by the deceased's will, has been made and in whose favour. The decision-maker must, in exercising any discretion, ensure that it acts reasonably and that moral or other prejudices are set aside.

CASE STUDY

Ms G was the partner of Mr L. Mr L died and his nomination form named her to receive his death benefits under the Scheme. The Scheme managers also received a request from Mrs L, Mr L's former wife, that she be paid the benefits. This letter made prejudicial allegations against Ms G. The managers decided to pay half of the death benefit to each woman.

The Ombudsman found that Ms G and Mrs L were both potential beneficiaries and the managers were correct to consider them. However, their decision was flawed, as they had taken account of prejudicial allegations without giving Ms G an opportunity to refute them, which they should have done.

The nomination form

Where a scheme provides for the payment of a lump sum death benefit, scheme members are often asked to complete a nomination form, indicating in whose favour payment of the death benefit should be made. Nomination forms are generally not binding on the Trustees or other decision-maker (and often the nomination form itself will state that to be the case). However, any nomination form will be one of the factors to be considered in reaching a decision.

Whilst it is likely that, in the vast majority of cases, the circumstances will be straightforward, so that the wishes expressed on any nomination form can be followed, that is not invariably the case. Where the nomination form is not followed, the nominated beneficiary may, understandably, complain.

Decision-makers need to check when any nomination form was completed and whether, since then, there has been any change in the member's domestic or financial circumstances (for example, a divorce) which might cast doubt on the validity of the wishes expressed. Decision-makers should not assume that a failure to complete a new nomination form, following a change of circumstances, is always an accidental oversight.

The member may have intended to leave the nomination form as originally completed and this should be borne in mind.

CASE STUDY

Mr B died leaving a will, in which he left his assets to his daughter "including any payments to be made on my death". However, he had completed a nomination form three months later, which indicated that the death benefit should be paid to his fiancée, who was financially dependent on him.

The Scheme managers considered the will, the nomination form and the fact that Mr B's fiancée would inherit his house. They also took legal advice, and decided that the will was clear and took precedence over the nomination form. They paid the death benefit to Mr B's daughter.

The Ombudsman found that the wording of the will was clear and that the nomination form was not legally binding on the managers. He decided that whichever way the managers had decided the matter their decision would not have been perverse.

□ Giving reasons

As mentioned elsewhere, as a matter of good administrative practice, Trustees, when informing interested parties of their decision, should give reasons for their decision. This is perhaps not particularly pertinent in situations where there is no controversy, but in other circumstances, for example, where the deceased's expressed wishes are not followed, the disappointed beneficiary, if they are a person with a reasonable expectation of receiving benefits, will understandably expect to be told the reasons for the departure from the nomination form.

Those reasons will need to be framed with discretion: the other parties concerned are entitled to their privacy.

CASE STUDY

The complainant was a relative of a deceased member who disputed the propriety of a payment of death benefits which the Trustees had made. The Trustees refused to disclose to the complainant the information on which they had based their decision to make the payment, as to do so would breach the duty of confidentiality they owed to the payee.

The Ombudsman found that there is a difficult line to be drawn between a legitimate desire to protect people's confidentiality, and ensuring the accuracy of information. Other potential beneficiaries have a legitimate interest in being assured that decisions, which have the effect of denying benefit to them, have been properly and fairly made.

The Ombudsman decided that it would have been better had the Trustees provided a fuller explanation of their decision, and it may have been in their own interests to check the veracity of the information before them. They could have given reasons without revealing the source of their evidence, or without unduly infringing the payee's right to privacy, and their failure to do so was maladministration.

□ The need for sensitivity

Consideration of death benefits arises at a stressful period, and future financial security may be affected. Significant sums are often involved, and the decision-making process may involve seeking personal and financial information which might otherwise be regarded as private. Care should therefore be taken to ensure that such matters are handled with appropriate sensitivity.

The difficulty often facing Trustees, is the need to balance an understandable concern to be sensitive, with the need to take their decision on the basis of accurate information. Care needs to be taken when relying on reported information about relationships particularly where such reports come from those who stand to be financially affected by the decision. As noted elsewhere in this Guide Trustees may sometimes themselves have relevant evidence to bring to bear, but again need to ensure that such evidence is accurate and up to date.

8

Complaints handling

General Principles

- Be clear about what the complaint is about and what the complainant wants to resolve it.
- Consider whether informal attempts to resolve the complaint are appropriate.
- Ensure that the scheme has an Internal Dispute Resolution Procedure (IDRP) complying with statutory requirements.
- Publicise the existence of the IDRP, The Pensions Advisory Service (TPAS) and the Pensions Ombudsman.
- If maladministration is identified, provide appropriate redress, which may include compensation.
- Use the lessons learned from the complaint handling process to improve procedures.

Who is the complaint against?

Most complaints to the Ombudsman are made against the Trustees or managers of a scheme. Complaints may sometimes be made by a member against the employer, or the administrator of a scheme. The identity of the respondent is not always clear from the way the complaint is expressed. The general principles set out in this chapter would still apply to an employer or administrator dealing with a complaint, but there is no requirement for them to operate an IDRP as set out below.

What is the complaint about?

It is sometimes difficult to decide whether or not there is a complaint, as opposed to a request for information or clarification of the Rules of the scheme.

A useful first step is to clarify what outcome the member concerned is seeking. Not only may this help clarify what the complaint is about, but it also encourages the parties to look forward and consider whether the matter can be resolved. For many complainants, what happens next is perhaps of more importance than what has happened so far.

A face to face meeting with the complainant may help, particularly if the complaint arises from a misunderstanding.

The complaint handler should ensure that the complainant is kept informed of the process that will be followed, who is dealing with the matter, and how long the process is expected to take. If an attempt has been made to resolve the complaint informally, the complainant should be informed if it appears that a resolution will not be reached, to allow him to start the formal process if he wishes.

CASE STUDY

A complaint had been made that incorrect information about benefits had been given. It was difficult to establish whether the complainant had relied on the information in making certain decisions, so the Ombudsman held an informal meeting with the complainant.

Although the Ombudsman's decision was that reliance could not be established, and that he could only award compensation for distress and inconvenience, the complainant wrote saying that he felt it had been beneficial to be able to discuss the whole situation face to face.

□ The Internal Dispute Resolution Procedure (IDRP)

The scheme must have an IDRP to comply with statutory requirements. The scheme booklet should contain clear information about the procedure and how members can make a complaint.

The scheme booklet should include information about the existence of The Pensions Advisory Service and the Pensions Ombudsman. This information should also be included in the Trustees' decision issued under the IDRP. There may be value in suggesting that a complainant contacts The Pensions Advisory Service at an earlier stage of the process.

When dealing with a complaint under the IDRP, the Trustees should make sure the appropriate time limits are complied with. If the Trustees have a valid reason for not meeting a deadline for giving a decision, the complainant should be informed of this before the deadline has expired, and told the date by which a decision will be available.

CASE STUDY

The complainant requested a complaint form in relation to the Scheme's failure to deal with his request that his benefits be paid in a way which did not require a bank account. The Scheme manager refused to provide a form, saying that the issue he wished to complain about did not involve the Scheme regulations and could not therefore be considered under the IDRP.

The Ombudsman found that the IDRP was not so restrictive. The procedure is open to members who have an enquiry or complaint relating to Scheme membership, entitlement to benefits, or any decision which has been made which affects those benefits. The Ombudsman found that the matter about which the complainant was complaining affected his entitlement to benefits, and he should have been given an opportunity to use the IDRP, and it was maladministration for the manager to have refused this.

In any event, if a complainant is being denied an opportunity to use the IDRP, he should be informed that he could make a complaint to the Ombudsman.

□ **Communicating the decision**

The decision letter should deal with all of the complaints made, be written in clear English, and avoid jargon wherever possible. If there has been maladministration, the letter should set out the steps intended to take to put it right. If the maladministration has caused distress or inconvenience, some compensation may be appropriate. If a reasonable offer of redress has been made, the Ombudsman is unlikely to pursue an investigation of a subsequent complaint, or if he does, he is likely to direct a lesser payment of compensation than might otherwise be payable.

□ **Put yourself in the position of the complainant**

"It would have made a lot of ill-feeling better if they had apologised rather than blaming me; I don't accept that I should know the ins and outs of pensions schemes. I don't think they would know the finer points of tool-making (my job)".

When responding to a complaint, either in writing or orally, the complaint handler should ask: will the person receiving the response understand it? It is very easy for people who move in pensions circles simply to assume that members of pension schemes will readily understand terms used in those circles.

□ **Using the complaint to improve**

Even if there has been no maladministration, the investigation of any complaint may show up improvements that could be made to procedures or communication. Acting on these, may help the scheme avoid complaints in the future, as well as improving the service available to members of the scheme.

9

Winding up a scheme

General Principles

- Take account of the interests of the whole scheme membership, and avoid conflict with their own personal interest.
- Consider whether to resolve to wind up the scheme, if the Trustees have the power to do so, and to crystallise any debt before it grows, if this is in the members' best interests.
- Where there is a doubt about solvency, early retirements and full transfer values should not be granted until the financial position of the scheme has been determined.
- Exercise extreme caution in considering whether to grant early retirement benefits just prior to the wind-up.
- Benefits should be provided in accordance with statutory provisions and scheme Rules, the former taking precedence.
- Pay as high a proportion of benefits as possible when the benefits become due for payment, without jeopardising the benefits of other members.
- Keep members regularly informed of progress, or the lack of it, during the winding-up.
- Keep the costs of the winding-up to a minimum.

The role of the Ombudsman in relation to winding up

Schemes which are wound up in deficit often generate complaints from members who understandably perceive injustice in not receiving the level of pension they had anticipated. The Ombudsman can properly direct compensation, or indeed any other action, only if there has been maladministration or if the winding-up has not been carried out lawfully. That a scheme is being wound up in deficit is not, of itself, evidence that there has been maladministration.

There may, however, be allegations that the deficit has arisen because of maladministration or a breach of the trust.

□ Acting in the members' best interests

The duty to exercise the Trustees' powers in the best interests of all the members applies throughout the winding-up process.

CASE STUDY

The complainant had been a member of a Scheme which discontinued in 1990. Early in 1994, the employer was put into administrative receivership and, in 1996, an Independent Trustee was appointed to wind-up the Scheme. The employer had acted as the Trustee of the Scheme until the Independent Trustee was appointed.

The Ombudsman criticised the employer, as Trustee, for taking no action to wind up the Scheme between 1990 and 1996. This had clearly not been in the best interests of the Scheme members, and particularly of the complainant, who had been trying to transfer his benefits out of the Scheme since 1993. No action could be taken against the employer as Trustee, however, as the company no longer existed.

The complaint of delay by the Independent Trustee in winding-up the Scheme was not upheld. The Independent Trustee had delayed the winding-up whilst it tried, successfully, to obtain money for the benefit of the Scheme that had been deposited in an escrow account. As the Scheme had been in deficit at the time it discontinued, such delay had been in the members' best interests, as the proceeds of the escrow account had improved the Scheme's finances.

□ Taking a decision to wind up the scheme

The employer might have refused, or have been unable, to pay contribution rates recommended by the actuary. In such circumstances, the Trustees might be advised to wind up the scheme, if they have the power to do so, in order to crystallise the deficit and prevent the risk of employee contributions not being paid over to the investment manager; a failure of the Trustees to wind up the scheme at the appropriate time might constitute maladministration. Winding-up might, however, force a solvent employer into administrative receivership or liquidation, with the loss of the jobs of active members of the scheme. A decision to defer winding-up may be appropriate in some circumstances. The decision of the Trustees, acting in the members' best interests, to wind up the scheme, would need to balance the interests of active members against those of pensioners and deferred members, who would have less direct stake in the company's continuing existence.

CASE STUDY

Ten complainants submitted identical complaints about a Scheme which had discontinued in August 1992, following the appointment of a liquidator to the company. The Scheme had had a Corporate Trustee, which had been replaced in 1986 by the employer. An independent Trustee company had replaced the employer as sole Trustee of the Scheme in 1993. The Scheme had been in financial difficulties for a number of years, mainly caused by the company's failure to pay the recommended level of contributions, or to pay top-up single premiums when this had become necessary. Despite the Scheme's parlous financial state, the company, as Trustee, had, in December 1991, instructed the investment manager (an insurance company) to pay full retirement benefits to two members and to pay augmented benefits to another member, who was also a Director. Two other Directors signed a form, required by the investment manager, recognising the possible consequences for other members of the Scheme. The company had then gone into liquidation in August 1992, leading to the winding-up of the Scheme.

The Ombudsman found that the failure of the company to pay the required level of contributions had clearly not been in the members' best interests. The company could have resolved in April 1987, to cease contributing and to administer the Scheme as a paid-up fund, which would have ensured greater security for members' benefit entitlements. As Trustee, it had failed in its primary duty to safeguard the interests of the Scheme beneficiaries. No useful directions could, however, be made against the company, which was in liquidation. The Directors, however, were considered by the Ombudsman to be administrators of the Scheme who had been dishonest in authorising the two full pensions and the augmentation. The independent Trustee was directed to ensure that the benefits available to the complainants were the same as they would have been if the Scheme had been made paid-up in April 1987, with the Directors having to pay to the Scheme the additional amount required.

Conflict of interests

Problems of conflict of interest commonly arise, particularly under small insured schemes, where the employer has also acted as the Trustee of the scheme. Such problems also arise where Trustees of the scheme are Directors of the employing company.

The Ombudsman may receive (and investigate) complaints about some members receiving preferential treatment, or benefiting from insider knowledge prior to the events causing the winding-up – the last example above being a case in point. The Directors must have known that the company, as well as the Scheme, was in serious financial difficulties, yet granted one of their number an enhanced pension only months before the company went into liquidation.

Final salary pension schemes are often wound-up in deficit, but can sometimes be wound-up when there is a surplus of assets over liabilities. Complaints can arise in such cases, when Directors are admitted to the scheme just before the wind-up, and granted enhanced benefits by the Trustees, taking advantage of the surplus. In such circumstances, the Trustees have a duty to exercise their powers in the best interests of the scheme's membership as a whole, even where to do so may not be to their own personal advantage.

□ Early retirement benefits

When a final salary scheme begins to wind up, the Trustees should be reluctant to grant early retirement pensions, or unreduced normal retirement pensions, or full transfer values out of the scheme, until the financial position of the scheme has been established. Efforts should, however, be made to pay at least some benefits if a member reaches normal retirement date during the winding-up – perhaps just the Guaranteed Minimum Pension (GMP). The failure to provide any benefits before the winding-up had been completed in such circumstances, might be regarded as maladministration.

CASE STUDY

The complainant was made redundant shortly after administrative receivers had been appointed in 1991. A professional independent Trustee company was then appointed to wind-up the Scheme. Its letter to members, early in 1992, stated that members who had retired since the company went into receivership had been receiving their full pension entitlements on a provisional basis, until it was possible to ascertain whether the Scheme could meet all of its liabilities. Subsequent Scheme accounts indicated that there had been two Scheme pensioners before the company had gone into administration, but that this had increased to six by 1992, to seven by 1993 and to eight by 1994. The Scheme had had just 24 active members at the time of the 1989 valuation report, no deferred members and one pensioner. The Independent Trustee had been aware, early in 1992, that the Scheme was marginally in deficit, and that there had been arrears of both employee and employer contributions.

The Ombudsman was very critical of the Independent Trustee, finding that it had acted in breach of trust in paying, in full, six further pensions during the three years following the receivership. This had clearly not been in the best interests of the remaining members of what had always been a small Scheme. He would have directed the Independent Trustee to recalculate these pensions, to reduce them where it was found that they had been overpaid, and to make appropriate improvements to the complainant's benefits. He found, however, that, although the Independent Trustee had acted in breach of trust, it had not done so knowingly and wilfully, so could take advantage of the Scheme's exoneration and indemnity provisions. He merely recommended, therefore, that, if the Independent Trustee wished to rely on the exoneration clause, its Managing Director should write a letter of apology to the complainant.

CASE STUDY

One of the members of a Scheme in wind-up, complained about an early retirement pension granted to the Chairman of the company just prior to the company going into liquidation and the Scheme commencing winding up. The Chairman, who was also one of the Trustees, had continued to work for the company, drawing his salary as well as the pension.

The Ombudsman found that the company, the consent of which was required for the early retirement, was in breach of its duty of good faith in giving its consent, and that the consent was improper. He also found maladministration by the Trustees of the Scheme in relation to the early retirement. The Chairman's early pension was drawn in breach of Scheme Rules and gave him an unconscionable advantage over members who had not retired because of the priority Rules on winding up.

The Ombudsman required that the Trustees repay the cost of the early retirement pension to the Scheme.

CASE STUDY

The complainant had requested an early retirement quotation but, on the basis of the figures he received, decided not to proceed. Two of the company Directors, who were Trustees of the Scheme, also requested quotations at the same time, and did receive full retirement benefits. After the complainant had decided not to proceed, the company went into administrative receivership and an Independent Trustee was appointed to wind-up the Scheme. The Independent Trustee, having examined the current Scheme Rules, advised members that requests for early retirement pensions would not be considered. The complainant was made redundant shortly afterwards, and became entitled to a deferred pension. The Independent Trustee then realised, from an examination of the Scheme's previous Rules, that members over the age of 50 (such as the complainant) had entitlement to a full early retirement pension, without reduction for early payment, without the consent of the Trustees or the employer being required.

The complainant requested such a pension, but the Ombudsman did not consider that he was entitled to it. The Ombudsman also decided that the two Directors/Trustees had made proper written applications for early retirement pensions in accordance with the previous Rule(s), and were entitled to these pensions. Although they had inside information, as Directors and Trustees, they had followed the correct procedures, and there had been no breach of trust in granting these pensions to them. The complainant accepted this argument and withdrew this part of his complaint. As a member with a deferred pension, the complainant came lower down in the order of priorities on the winding-up of the Scheme.

□ Provision of information about the progress of the winding-up

The Ombudsman receives many complaints about the failure to provide information about the progress or, more often, the lack of progress, with the winding-up. Trustees are obliged to inform scheme members of the current position within a year of a scheme beginning to wind-up, and every year thereafter. Trustees often fail to do this.

The announcement of the winding-up of a pension scheme can come as a very unpleasant surprise to pension scheme members, and might be allied to the liquidation of the employer and the loss of the members' jobs. Lack of regular information inevitably leads to the suspicion that the Trustees/former Directors have something to hide, and that there is a serious deficiency under the scheme, when often this will not be the case. Although regular communication increases the costs of winding-up the scheme, it is often well worthwhile if it allays fears that all is not well.

CASE STUDY

The complainant brought a number of complaints about the winding-up of his Scheme, one of which was that there had been a lack of information about the progress, or lack of progress, with the winding-up. The Scheme had started to wind up on 31 December 1999 and, from then to 24 June 2003, the Independent Trustee had issued eight circulars in order to keep members informed. The first had been issued within a month of the Scheme starting to wind-up, the seventh had been issued on 24 June 2002 and the eighth had been issued a year later.

The complaint that there had been a lack of information on the progress of the winding-up could not be upheld.

Time taken to wind up the scheme

Another common complaint is that the winding-up is taking an excessive time to be completed, even where communication with members has been on a regular basis. Even a relatively simple scheme, with few members, can take a long time (perhaps several years) to wind up, particularly if the scheme was contracted out.

The Ombudsman will take into account common difficulties encountered by Trustees in winding up schemes. For example, problems can arise in reconciling membership records, and delays can be caused by third parties who hold information about the scheme. However the Ombudsman will expect Trustees to wind up the scheme in a reasonable time taking account of the particular circumstances, and to use their best efforts to minimise delays.

CASE STUDY

The complainant considered that the winding-up of the Scheme, of which he was a member, was taking an unreasonable length of time. The Scheme had, at the time the Ombudsman made his decision, been in wind-up for four years. The Scheme was, however, contracted out, and there had been severe delays in obtaining information from the Inland Revenue National Insurance Contributions Office and then reconciling that information with the Scheme's records. After its appointment, the Independent Trustee became aware of various linked Schemes, which required investigation. A claim for unpaid contributions had to be made and agreed, both with the Government Redundancy Payments Service and with the liquidator. Difficulties with reconciling data meant that members had not yet been quoted the options open to them. The complainant had not been advised that he could have a transfer value quotation, but had now been given one. Until he knew his full options, however, he could not decide whether a transfer value would be beneficial to him.

The independent Trustee hoped to have completed the winding-up of the Scheme by the end of 2004, which was within the reporting guideline stipulated by the Occupational Pensions Regulatory Authority, and the Ombudsman did not consider that delays had been excessive, given the complexity of the winding-up, or that the Independent Trustee had been tardy in progressing the termination of the Scheme.

□ Costs of winding up

Some complaints relate to the fees charged by Independent Trustees appointed under statute to wind up the scheme. These are a first charge on the scheme, and some members might consider them to be excessive. The Ombudsman may investigate complaints, both about the level of charging and the hours for which charges are claimed.

CASE STUDY

The complainant complained, among other things, about the costs of winding up the Scheme of which he was a member, which he considered to be excessive. The complainant also considered the hourly rates charged to be excessive.

The Independent Trustee's fees had been scrutinised by a member of the Law Society's Remuneration Committee, who had no connection with the Independent Trustee. He had been happy with the fees charged, considering that the necessary tasks had been carried out by members of staff at the right level of seniority. The fees charged to date by the Independent Trustee were 1.9% of the Scheme's assets, and total expenses to date, including legal, administration, actuarial, investment and audit costs, totalled some 3% of the Scheme's assets. The Independent Trustee was confident that the total winding-up costs, including legal and actuarial fees, would be within the allowance of 4% included in the Minimum Funding Requirement.

The Ombudsman did not consider the total fees charged to date by the Independent Trustee, or the hourly rates charged, to be excessive. He was satisfied that the fees had been scrutinised by an independent solicitor.

